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FEB 17 1984
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No. 83 - 87

In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

THOMAS R. MILLER
Miller, Tracy, Braun,
& Wilson, Ltd.
316 S. Charter
Monticello, IL 61856
(217) 762-9416

Counsel for Petitioners

KRAMER PRINTING COMPANY • MONTICELLO, IL 61856

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PREFACE

One of the central issues in this case is whether respondent has a property right which is protectible under the Constitution and the Civil Rights Act. Since the "right" asserted by respondent is one of public employment, the importance of state law is paramount, it being well established that property interests in employment are created either by state statute

or state contract law. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L.Ed.2d 684 (1976). Consequently, proper judicial construction of the Illinois tenure statutes is imperative in the case at bar. To this end, petitioners feel that clarification is in order as a result of respondent's arguments in part I.A. of his Reply Brief.

Additionally, respondent argues at length in part I.B. of his Reply Brief that federal common law creates for him a protectible property interest. Although petitioners strongly believe that such a suggestion has long before been rejected by this Court, they find it appropriate to reply to respondent's argument.

Finally, since respondent has chosen to address the other central issue--the "deprivation" issue--only in terms of "practicality", further comment is in order on this point as well.

ARGUMENT

I. RESPONDENT'S CITATION OF STATUTORY AUTHORITY AND CASE LAW ON THE STATUTORY CONSTRUCTION ISSUE IS MISPLACED.

A. Statutory Authority

In part I.A. of his Reply Brief (Reply Brief, pp. 8-11), respondent relies on §10-20.7 and §10-21.1 of the Illinois School Code[1] as authority for the proposition that the Illinois legislature has not limited an Illinois school board from entering into a two-year probationary term contract with a beginning teacher. More specifically, respondent argues that the phrase "subject to the limitations set forth in this Act", found in both

[1] See Respondent's Reply Brief, p.2, for text of §10-20.7 and §10-21.1 of the Illinois School Code

§10-20.7 and §10-21.1, refers to limitations on the length of a teacher's contract, those limitations to be found elsewhere in the School Code. From this, respondent concludes that since there are no express limitations on the length of probationary contracts found elsewhere in the School Code, there is no prohibition against a two-year probationary contract.

Respondent's reliance on the aforementioned statutory language is erroneous. It is erroneous for the reason that the phrase "subject to the limitations set forth in this Act", found in §10-20.7 and §10-21.1 refers to statutory limitations on teachers' salaries and nothing more.[3] The Illinois Supreme Court construed the subject phrase as such in *Richards v. Board of Education*, 21 Ill.2d 104 (1960), when it said at 109:

> From the language the legislature has implemented, it is clear that a school board has discretionary control over the salaries of its teachers, *subject only to any limits expressly fixed by the School Code* and to constitutional prohibitions

---

[3] Respondent attempts to buttress his argument by citing §34-39 of the Illinois School Code, which authorizes the Chicago Board of Education to enter into multi-year contracts with its employees. Respondent's reliance on §34-39 is misplaced for two reasons. First, the three-year provision is a specific grant of authority rather than a limitation (much the same as §10-23.8 and §10-23.8a authorize multi-year contracts for superintendents and principals). Second, §34-39 has application only to cities having a population exceeding 500,000, which means the City of Chicago.

[4] The School Code contains a number of limitations upon the power of school boards to fix the salaries of teachers (e.g. §10-20.7--prohibiting discrimination on account of sex or loss of pay because of jury duty; §10-20.15--prohibiting payment of salaries to uncertified teachers, or teachers who have failed to account for school property; §24-1--providing for teachers' wages to be paid monthly; and §24-8--establishing minimum salaries and giving credit for prior teaching experience).

> against actions that are arbitrary, discriminatory and unreasonable, or based upon an improper classification. (Emphasis added)

B. Case Law

Respondent also cites *Libertyville Education Association v. Board of Education of School District No. 70, Lake County*, 56 Ill. App.3d 503, 371 N.E. 2d 676 (2d Dist., 1977) as further authority that the Illinois tenure provisions do not prevent two-year probationary term contracts for probationary teachers. Again, respondent's reliance is misplaced.

The *Libertyville* case concerned the validity of a five-year collective bargaining agreement between a local board of education and a teachers' union. The Appellate Court found that such an agreement was not in contravention to the board's duty to fix teachers' salaries and was, therefore, not void or invalid. It is crucial to note that in *Libertyville* the contract in question was a collective bargaining agreement between the board and its teachers, not an individual contract between one teacher and the board. The multi-year contract in *Libertyville* had no effect upon the duty of the board to hire and fire teachers; it merely established pay schedules and bargainable policies for the term of the agreement. The court itself recognized the distinction between a case involving a contract purporting to bind a school board to employ a particular teacher in excess of one year and the case before it involving a collective bargaining agreement, to-wit:

> By contrast, in the instant case, the collective bargaining agreement did not purport to limit the Board's authority to hire or discharge teachers, and the old problem of whether or not a board can contractually bind itself to employ a particular teacher for a term longer than the current school year has, in any event, been pre-empted by the

teacher tenure laws (382 Ill. 383), 56 Ill.App.3d at 506.

It is plain that neither the language of §10-20.7 and §10-21.1 nor the holding in *Libertyville* support the position that Illinois probationary teachers may avail themselves to any more than two successive one-year term contracts within the backdrop of the Illinois tenure scheme.

II. CONTRARY TO RESPONDENT'S SUGGESTION, THIS COURT HAS YET TO RECOGNIZE THE CREATION OF A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT BY FEDERAL COMMON LAW.

In part I.B. of his Reply Brief (Reply Brief, pp. 11-20), the respondent seems to argue that even if he had no enforceable contract right under Illinois law, he has an enforceable property right under the United States Constitution. In essence, respondent asserts that a federal common law right can be created--as if by estoppel--which will rise to the level of "property" within the meaning of the Constitution. Such an assertion flies directly in the face of this Court's pronouncement that "[P]roperty interests, of course, are not created by the Constitution". *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).[1]

Specifically in cases of public employment, this court has said that a property interest in continued employment can be created in either of two ways--by statute or contract (ex-

[1] See also *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 56 L.Ed.2d 30, 198 S.Ct. 1554 (1978); *Bishop v. Wood*, 426 U.S. 341, 344, 48 L.Ed.2d 684, 96 S.Ct. 2074 (1976); *Paul v. Davis*, 424 U.S. 693, 709-710, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); *Goss v. Lopez*, 419 U.S. 565, 572-574, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975); *Perry v. Sindermann*, 408 U.S. 593, 602 n.7, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972).

press or implied)." "In either case, ..., the sufficiency of the claim of entitlement must be decided by reference to state law". *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (footnote omitted). In other words, in order to determine whether the state has worked a deprivation of property within the context of public employment, the first inquiry must be whether or not there exists an enforceable right to continued employment under state law. If no such right exists, no property right is implicated. Furthermore, if the right is created by contract, the nature of that right for Constitutional purposes cannot be decided on that fact alone, but rather must be evaluated with reference to state law, for there is no rule of constitutional law that every public employment contract is property within the meaning of the Constitution. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Lyznicki v. Board of Education*, 707 F.2d 949 (7th Cir., 1983); *Green v. Board of School Commissioners*, 716 F.2d 1191 (7th Cir., 1983) *(per curiam)*; *Casey v. DePetrillo*, 697 F.2d 22 (1st Cir., 1983) *(per curiam)*; *Manning v. Lockhart*, 623 F.2d 536 (8th Cir., 1980) *(per curiam)*.

In sum, contrary to respondent's analysis of the property interest issue advanced in part I.B. of his Reply Brief, the combination of state statutory and contract law will determine whether the respondent had a property interest as meant in the due process clause. As previously argued in their Brief, petitioners assert that Illinois law, when properly analyzed and applied, blocks respondent's claim that he has a protectible property right to continued employment

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[1] See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

on either of two fronts: 1) the Illinois tenure statute prohibits a two-year probationary term contract; and 2) a term probationary contract within the Illinois tenure scheme does not warrant the protection of federal law, and, consequently, is not a Fourteenth Amendment property interest.

III. RESPONDENT'S ANALYSIS OF THE "DEPRIVATION" ISSUE FALLS SHORT.

Since respondent has chosen to analyze the "deprivation" issue in part III of his Reply Brief only in terms of "practicality" and without any argument that there was, in fact, a "deprivation" within the meaning of the Constitution, further comment is in order.

A. There has been no deprivation of any right secured by the Constitution.

Notwithstanding petitioners' assertion that a term probationary teaching contract in the state of Illinois is not property within the meaning of the Fourteenth Amendment, there has been, in any event, no deprivation of a right secured by the Fourteenth Amendment in the case at bar. It cannot be seriously contended that respondent has any remedy other than money damages.* Respondent's actual

* Respondent (Reply Brief, p. 29) suggests, without authority, that reinstatement is a remedy which might be available under federal law. It is assumed that such a suggestion stems from the notion that respondent had a "right" to teach and coach. Viewed in terms of contract law, respondent's "right" to teach and coach was merely a consideration he gave for receiving salary and other benefits. As such, any rights concerning respondent's teaching and coaching belong to the Board of Education which presumably was free to waive such rights. Thus, it is difficult to ascertain how respondent's "right" to teach and coach could amount to anything more than a unilateral expectation that he would be allowed to continue to do so. See also *Bessler v. Board of Education*, 43 Ill. App. 3d 322, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill. 2d 191, 370 N.E.2d 1050 (1976).

right resulting from the breach of his term contract is to seek redress in the form of money damages from his employer. He can seek this remedy in state court, and until he has done so and been turned down, it cannot be said that he has suffered a deprivation. See *Bonner v. Coughlin*, 517 F.2d 1311, 1320, n. 27 (7th Cir., 1975), modified *en banc* 545 F.2d 565 (1976), cert. den. 435 U.S. 932 (1978).

B. There has been no denial of due process in any event.

If deprivation there was, it is a loss measured in monetary terms, and in view of the state court remedy available to respondent, the question to be answered is whether the deprivation really was "without due process of law." *Baker v. McCollan*, 443 U.S. at 145, 61 L.Ed.2d 433, 99 S.Ct. 2689. To answer this question, petitioners assert that this court

> must decide whether the [common law contract] remedies which the state of [Illinois] provides as a means of redress for property deprivations satisfy the requirements of procedural process. *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

Petitioners recognize that there are a number of factors to be considered when deciding whether common law remedies constitute due process. These factors are:

> First, the private interest that will be affected[1]

[1] *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976) held a post-deprivation administrative hearing constitutionally adequate for cutting off disability payments, while *Ingraham v. Wright*, 430 U.S. 651 (1971) held that a state tort suit was sufficient due process to a student subject to corporal punishment. See also *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir., 1982) and *Lossman v. Pokorske*, 707 F.2d 288 (7th Cir., 1983), wherein the court held post-deprivation judicial remedies constitutionally adequate involving deprivation of custody of children.

> second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Ingraham v. Wright*, 430 U.S. 651, 675, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1971).

Petitioners assert that an analysis of the first of these factors -- the private interest affected--focuses on the importance of the interest and the finality of the deprivation. *Logan v. Zimmermann Brush Coompany*, 455 U.S. 422, 434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).*

Finality of deprivation can be measured in two ways: 1) finality attaches when there is no opportunity to obtain judicial review; 455 U.S. at 434; and 2) finality attaches if the state common law remedy will not make the complainant whole; 455 U.S. at 436 and 437. If finality attaches in either of these two contexts, a pretermination hearing is mandated. *Logan v. Zimmermann Brush Company*, 455 U.S. 422, 434, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). If it does not, a post-termination hearing may be all the process that is due. Neither of these tests are met in the case at bar.* Con-

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* Although a temporary loss of employment may not be insubstantial, it is no more grievous than cutting off one's disability benefits or taking one's children. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976) and *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir., 1982), wherein post-deprivation judicial remedies were held to be constitutionally adequate.

* In comparing this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982) with the case at bar, *Logan* can be distinguished not only because the Plaintiff had no opportunity to obtain judicial review, 455 U.S. at 434, but also because the state court remedy would not have made the Plaintiff whole, 455 U.S. at 436-37, unlike the present case.

sequently, respondent's state court remedy is all the process that is due. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). The additional procedural safeguard that the respondent seeks, a deprivation administrative hearing, would be of little utility when compared with the full evidentiary kind of hearing respondent can avail himself to in state court by suing for breach of contract.

—o—

CONCLUSION

For all of the reasons argued herein and in petitioners' Brief, the Judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

THOMAS R. MILLER
MILLER, TRACY,
BRAUN & WILSON, LTD.
316 S. Charter
Monticello, Illinois

Counsel for Petitioners